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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

DAYLEN JASON HUGHES,

Petitioner,

v.

DERRAL ADAMS, Warden,

Respondent.

C 07-4442 CRB (PR)

**REPLY TO OPPOSITION TO
MOTION TO DISMISS
HABEAS CORPUS PETITION
AS UNTIMELY**

ARGUMENT

Petitioner requests this Court to excuse his 14 and one-half month delay in filing his federal petition for writ of habeas corpus because he was placed in administrative segregation (“Ad-Seg”) for eight or nine months; he was transferred to another prison, where he was placed in the segregated housing unit (“SHU”) for over three months; he did not have access to all of his legal materials while in Ad-Seg and still has not received all of his property; and he had inadequate access to the law library while in the SHU. Since petitioner did not diligently pursue his claims, and his circumstances are not extraordinary, he has failed to establish that his case warrants equitable tolling.

Assuming that AEDPA's statute of limitations may be equitably tolled, it is available "only when 'extraordinary circumstances beyond a prisoner's control make it impossible to file a petition on time.'" *Espinoza-Matthews v. California*, 432 F.3d 1021, 1026 (9th Cir. 2005), quoting *Spitsyn v. Moore*, 345 F.3d 796, 799 (9th Cir. 2003). "Generally, a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005). The petitioner must show that the extraordinary circumstances caused the untimeliness. *Spitsyn v. Moore*, 345 F.3d at 799.

Petitioner contends his placement in Ad-Seg at Pleasant Valley State Prison in July or August of 2005 until his release from SHU at Corcoran State Prison on June 28, 2006 was an extraordinary circumstance preventing him from timely filing his federal petition. Resp. to Opp. at 2. "Transfers between prison facilities, solitary confinement, lockdowns, restricted access to the law library and an inability to secure court documents do not qualify as extraordinary circumstances." *Lindo v. LeFever*, 193 F.Supp.2d 659, 663 (E.D.N.Y. 2002.) To the extent petitioner caused his own placement in Ad-Seg or SHU, the placements were not circumstances beyond his control. *Espinoza-Matthews v. California*, 432 F.3d at 1026. In *Espinoza-Matthews*, the petitioner was placed in Ad-Seg for his own protection after another prisoner assaulted and slashed him. *Id.* at 1023 & 1028 n. 7.

Moreover, petitioner has failed to demonstrate that he pursued his claims diligently when he was not in Ad-Seg or the SHU. The obligation to act diligently does not pertain solely to the filing of the federal habeas petition, but exists during the period the petitioner is exhausting state remedies as well. *Roy v. Lampert*, 465 F.3d 964, 972 (9th Cir. 2006). Petitioner had four or five months between the denial of his petition for review of the direct appeal in the California Supreme Court on March 16, 2005, and his placement in Ad-Seg in July or August of 2005. *Cf. id.* (petitioners diligently pursued claims before external impediment existed). After petitioner was released from SHU in Corcoran on June 28, 2006, he waited three months to file his state habeas petition in the California Supreme Court. The petition was pending for seven months. After the California Supreme Court denied the petition, petitioner waited another three

1 months to file the instant petition. The petitioner in *Pace v. DiGuglielmo*, 544 U.S. at 418-19,
2 failed to demonstrate the requisite diligence because he not only waited years before seeking
3 postconviction relief, he then waited five months after finality of his postconviction proceedings
4 before seeking relief in federal court.

5 Petitioner contends that when he was placed in Ad-Seg at Pleasant Valley State Prison,
6 his personal property and *some* legal documents were missing, and he was not given access to *all*
7 of his legal materials. Resp. to Opp. at 2. He adds that he still has not received all of his
8 property. Resp. to Opp. at 3. Petitioner fails to describe what legal materials he had and what
9 legal materials were missing, or explain what claims the missing legal materials prevented him
10 from raising and how he was prevented from raising them. Since all the claims petitioner raised
11 in the petition—he received ineffective assistance of defense and appellate counsel because there
12 was insufficient evidence of his crime, he did not receive *Miranda* warnings, and the trial court
13 erred in denying his motion to withdraw his plea—involve facts and issues petitioner has known
14 since his conviction, the lack of some legal materials did not prevent timely filing. *United States*
15 *v. Battles*, 362 F.3d 1195, 1198 n. 5 (9th Cir. 2004) (issues in petition may show lack of
16 transcript did not actually delay filing of petition).

17 In any event, petitioner was able to file a state petition and the instant petition although
18 he claims he still has not received all of his property. Delay in obtaining a transcript does not
19 justify tolling where the transcript is not necessary to file the petition. *Donovan v. Maine*, 276
20 F.3d 87, 94 (1st Cir. 2002). In *Gassler v. Bruton*, 255 F.3d 492, 495 (5th Cir. 2001), a six-month
21 delay in obtaining the trial transcript was not a basis for equitable tolling where the petitioner
22 waited five months longer to seek post-conviction relief in state court, the transcripts were not
23 necessary to filing, and the petitioner failed to explain what claims he was unable to make
24 without a complete transcript.

25 The appeal form attached to petitioner's response demonstrates that he did not
26 diligently seek the legal materials that had allegedly been missing since his placement in Ad-Seg
27 in July or August of 2005. The form states that petitioner complained that on April 21, 2006, he
28 received little of his property, after petitioner was in the SHU at Corcoran. Resp. to Opp., Ex. A

1 at 1. The appeal form shows petitioner never complained that his legal materials were not
2 provided. *Cf. Espinoza-Matthews*, 432 F.3d at 1027-28 (petitioner diligently attempted to obtain
3 legal material while in Ad-Seg). Petitioner complained that he was not able sort through his
4 property and choose what incoming mail, photographs, or magazines he could keep, and that he
5 was required to pay the postage to mail his remaining property home. Resp. to Opp., Ex. A.at 1-
6 2, & Attachment E. Petitioner stated that he received two bags, including a television. Resp. to
7 Opp., Ex. A at 2. Petitioner's failure to seek his legal materials demonstrates a lack of diligence
8 inconsistent with equitable tolling. The attachment also indicates that petitioner's property was
9 not missing until his transfer to Corcoran.

10 Petitioner contends he had inadequate access to the law library while in the SHU at
11 Corcoran, although he concedes he went to the law library "at least twice while housed in
12 Corcoran (SHU)." Resp. to Opp. at 3. Restricted access to the law library is not an
13 extraordinary circumstance justifying equitable tolling. *Lindo v. LeFever*, 193 F.Supp.2d at 663.
14 "[T]he Constitution does not require that prisoners (literate or illiterate) be able to conduct
15 generalized research, but only that they be able to present their grievances to the courts." *Lewis*
16 *v. Casey*, 518 U.S. 343, 360 (1996). Notably, petitioner was in the SHU at Corcoran only three
17 and a half months, and actually went to the law library at least twice during that period. Resp. to
18 Opp. at 2. Petitioner's restricted access to the law library for a three and a half month period does
19 not warrant equitable tolling.

CONCLUSION

Accordingly, respondent respectfully requests that this Court dismiss the petition for writ of habeas corpus with prejudice.

Dated: April 22, 2008

Respectfully submitted,

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **Hughes v. Adams, Warden**

No.: **C 07-4442 CRB (PR)**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004.

On April 22, 2008, I served the attached

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AS UNTIMELY**

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at San Francisco, California, addressed as follows:

Daylen Jason Hughes
V22456
3C05 #103 Low
P.O. Box 8800
Corcoran, CA 93212

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on April 22, 2008, at San Francisco, California.

M. Argarin

Declarant

/s/ M. Argarin

Signature